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# Possible future work in Public-Private Partnerships (PPPs)

## Discussion paper — Part I

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# I. Introduction

1. This Colloquium on possible future work in the area of PPPs is held pursuant to a suggestion of the United Nations Commission on International Trade Law (the Commission, or UNCITRAL) made at its forty-sixth session in 2013.[1] Its purpose is to make recommendations to the Commission on possible future work in PPPs for the next session. This paper is provided to the Colloquium to assist it in its deliberations.

## A. Background

2. At its 2013 session, the Commission considered the report of an earlier Colloquium on possible future work in PPPs (the "2013 Colloquium").[2]

3. The 2013 Colloquium reported that neither the UNCITRAL texts on Privately-financed Infrastructure Projects (the "PFIPs Instruments"),[3] nor other international texts on PPPs could be taken as a "de facto standard or model available to States for PPPs reform". The Commission heard of the wide use of the PFIPs Instruments, and descriptions of developments in PPPs since they were issued, and concluded that PPPs would be amenable to harmonization and the consensual development of a legislative text. The Commission noted, however, that "the PFIPs Instruments might be in need of some updating and revision, given the development in the market for PPPs, and ... the key elements of a legislative text on PPPs — drawing in large part on the PFIPs Instruments — were agreed".[4]

4. However, the Commission considered that further preparatory work would be required in order to set the scope for any mandate to develop a legislative text to be given to a Working Group. In particular, the Commission noted:

(a) A wide variation in terminology, scope and contents of existing texts at the national level; and

(b) Some divergence of views as to whether a Model Law or other legislative text on PPPs should be developed.

5. A main issue for this Colloquium, therefore, is to clarify the scope of any mandate recommended for development of a future legislative text. This clarity is required in order to demonstrate to the Commission that work towards developing a legislative text on PPPs would be ready for submission to a Working Group.[5]

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[1] See Report of the Commission, A/68/17, para. 331.

[2] Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013), document A/CN.9/779: the conclusions are summarized in paras 73-85 (available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html). For reasons of space, this paper does not refer to specific paragraphs of the Report.

[3] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[4] Report of the Commission, supra, para. 329.

[5] Both the scope of a future text on PPPs and the policy issues for deliberation must be clear. The Commission is satisfied that PPPs are likely to be amenable to harmonization and the consensual development of a legislative text, that a legislative text on PPPs would enhance the

6. The Colloquium may wish to note that the Commission will not consider whether to grant such a mandate to a Working Group in isolation; all suggestions for planned and possible future legislative development will be considered together, in order to allow the Commission to decide on its priority items. The Colloquium may wish, therefore, to comment on the importance to UNCITRAL of work on PPPs. Some relevant considerations are set out in Part II of this Paper.

## B. Studies and consultations between the 2013 Commission session and the date of this Colloquium

7. The Commission instructed the Secretariat to organize the preparatory work referred to above through studies, consultations with experts and a Colloquium. The preparatory work has followed the Commission's instruction to be inclusive and transparent and multilingual to the extent possible, and to take account of the experience in all regions, including both the public and private sector.[6] The results of these activities are presented below.

# II. Recommendations to this Colloquium arising from consultations and studies since the 2013 Commission session

8. The reports of variations in existing PPPs legislation made to the 2013 Colloquium[7] were based on research and the experience of the participants. While there was broad agreement that this view was accurate, it was agreed in the early stages of the consultations that a systematic survey should be undertaken to provide further details of national PPPs laws. The recommendations as regards the scope of a legislative text on PPPs would then be sufficiently grounded in practice.

9. The Secretariat, volunteer experts and consultants have therefore conducted extensive surveys of existing PPPs laws to assess the extent to which existing laws reflect the main topics in the PFIPs Instruments. The surveys included reviews of PPPs laws and regulations at the national and sub-national level (both PPPs legislation and other relevant legislation), in 58 countries. The countries surveyed were selected to provide regional diversity, as well as diversity in levels of economic development and legal tradition. This review, which is considered to cover a considerable percentage of PPPs legislation worldwide, can therefore be considered representative.

10. It was reported to the 2013 Colloquium that the scope of the Model Legislative Provisions and Legislative Recommendations was narrower than the Legislative Guide.[8] The surveys therefore identified both existing PPPs legislation that included

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law of international trade, and that proposed work would not duplicate work undertaken by other law reform bodies. Ibid., paras. 328 and 329.

[6] Report of the Commission, supra, para. 330.

[7] See, for example, the 2013 Colloquium Discussion Paper, para. 13, document A/CN.9/782, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html, and the reports and documents cited.

[8] See Report to the Third Session of the Team of Specialists on Public-Private Partnerships, Simmons and Simmons, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013-papers.html.

items beyond the scope of the Model Legislative Provisions and Legislative Recommendations, and provisions that went beyond the scope of the PFIPs Instruments as a whole.

**Table 1: List of countries surveyed**

| | | | |
|---|---|---|---|
| Albania | Egypt | Malaysia | Senegal |
| Angola | Fiji | Mauritius | Serbia |
| Argentina | France | Mexico | Singapore |
| Australia | Guinea | Mongolia | South Africa |
| Benin | Côte d'Ivoire | Morocco | Republic of Korea |
| Brazil | Jamaica | Mozambique | Spain |
| Bulgaria | Jordan | Niger | Sri Lanka |
| Burkina Faso | Kazakhstan | Nigeria | Tanzania |
| Cambodia | Kenya | Paraguay | Tunisia |
| Cameroon | Kosovo | Peru | Uganda |
| Central African Republic | Kyrgyzstan | Philippines | Viet Nam |
| Chile | Latvia | Poland | United States of America |
| Colombia | Lithuania | Puerto Rico | Zambia |
| Croatia | Macedonia | Romania | |
| Czech Republic | Malawi | Russian Federation | |

11. The analysis for each country's PPPs law was at a three levels:

(a) Is the main topic included in the Legislative Guide reflected in the country law (Yes/No);

(b) Are the Legislative Recommendations associated with the topic met (Yes/Partially/No);

(c) Are the Model Legislative Provisions met (Yes/Partially/No)?

12. An additional question posed was whether the country laws contained provisions in addition to those included in the PFIPs Instruments.

13. The consultants will present their detailed findings at the Colloquium, and a summary appears below.

14. The consultants report that there is a relatively high degree of reflection of the main topics of the Legislative Guide among the country laws analysed. However, compliance is significantly lower as regards the Legislative Recommendations themselves.

15. The consultants also report that, in relation to the main topics contained in Sections I-VI of the Legislative Guide:

"(a) At a summary level, the main topics in Sections I-VI of the Legislative Guide were reflected in country laws 59 per cent of the time on average, ranging

from 79 per cent (Section I — General and institutional framework) to 33 per cent (Section VI — Settlement of disputes);

"(b) In relation to Section III — Selection of the Private Party and Section IV — Construction and operation: legislative framework and project agreement, which account for 66 per cent of the Legislative Recommendations, the main topics were reflected in the country laws on average 63 per cent and 66 per cent of the time respectively;

"(c) In relation the Legislative Recommendations, and where the main topics in the Section were reflected in the country law, on average 58 per cent met the associated Legislative Recommendations. A further 36 per cent partially met the associated Legislative Recommendations, with 6 per cent of the sample who included the main topics failing to meet the Legislative Recommendations;

"(d) Taking the sample of 58 countries as a whole:

"(i) 36 per cent on average met the Legislative Recommendations;

"(ii) 23 per cent partially met the Legislative Recommendations;

"(iii) 41 per cent failed to meet Legislative Recommendations;

"(e) 'In respect of Section III — Selection of the Private Party' and 'IV Construction and operation: legislative framework and project agreement', which account for 66 per cent of the Legislative Recommendations:

"(i) Section III, 33 per cent of the Legislative Recommendations were met and a further 27 per cent were partially met but 40 per cent of the sample did not fully meet the Legislative Recommendations;

"(ii) Section IV, 27 per cent of the Legislative Recommendations were met and a further 34 per cent were partially met but 38 per cent of the sample did not fully meet the Legislative Recommendations;

"(f) In respect of Section VI — Settlement of disputes, 25 per cent of the Legislative Recommendations were met and a further 7 per cent were partially met but 68 per cent of the sample did not fully meet the Legislative Recommendations."

16. The main topics for which the consultants report a higher level of non-compliance than compliance with the Legislative Recommendations are:

(a) General legislative and institutional framework: two-thirds of the countries surveyed did not reflect the Legislative Recommendations on the authority to regulate infrastructure services;

(b) Project risks and government support: over half of the countries surveyed reflected or partly reflected the Legislative Recommendations overall, but as regards guarantees provided by international financial institutions and export credit and investment promotion agencies, for which there is no Legislative Recommendation but there is guidance in the Legislative Guide, only 28 per cent included legal provisions in the national PPPs law;

(c) Selection of the private party (37 per cent of the total number of Legislative Recommendations): while the main provisions of the selection method in the Legislative Recommendations were met or partly reflected in a high proportion of the countries surveyed, a majority did not reflect the Legislative

Recommendations on the record of the selection and award proceedings and on review procedures. Furthermore, exactly half did not reflect the provisions of the Legislative Recommendations on award without PPPs procedures, and only 52 per cent met or partly met those on unsolicited proposals;

(d) Construction and operation: legislative framework and project agreement: a majority did not reflect the Legislative Recommendations on security interests, assignment, transfer of controlling interest in the project company and construction works;

(e) Duration, extension and termination of the project agreement: there was a high degree of compliance in this area, though 45 per cent of countries surveyed did not meet the Legislative Recommendations on consequences of expiry or termination of the project agreement;

(f) Settlement of disputes: This section was the most poorly reflected in the countries surveyed, particularly as regards disputes other than those between the contracting entity and the private party.

17. This pattern reported was also broadly evident in the reflection of the Model Legislative Provisions in country laws. Again, the lowest level of compliance was found as regards the settlement of disputes.

18. This topic had already been flagged as one requiring revision to the PFIPs Instruments, so the consultants also considered dispute settlement provisions separately, reviewing national laws in Kyrgyzstan, Egypt, Kenya and Mongolia, the fourteen national PLC (Practical Law Company) sections on review procedures and remedies,[9] the PPP Guidelines of Malaysia as well as the documents found relating to PPPs in Australia, India, Japan, the Russian Federation, Turkey and Morocco. The summary findings are as follows:

(a) The treatment of review procedures and remedies in the specific context of PPP contracts is limited, but the rules applicable to public procurement aspects of PPP generally apply. To this extent, the laws of the following 14 countries are broadly consistent with Review Procedures under Chapter III of the Legislative Guide: Brazil, Canada (in addition, arbitration may be agreed as the form of dispute resolution), China (normally procurement law does not apply to PPP or concessions), the Czech Republic, the United Kingdom of Great Britain and Northern Ireland, France, Germany, Italy, the Netherlands, Poland, South Africa, Switzerland, Ukraine and the United States of America; and

(b) These country laws do not address disputes between service providers, or other commercial disputes (disputes between project promoters and between the private party and its lenders, contractors and suppliers and disputes involving customers or users of the infrastructure facility).

19. The main topics reported by the consultants are provided for in country laws but that are either not found in the PFIPs Instruments, or are covered in less detail or in different ways from the treatment in those texts, largely confirm the findings of the 2013 Colloquium. The first finding was that, while the PFIPs Instruments are a sound basis for law reform in PPPs, certain aspects of the PFIPs Instruments are in need of some updating and revision. Examples include the provision of services,

[9] http://us.practicallaw.com/.

unsolicited proposals, some aspects of project risk and government support, some aspects of the selection procedure, some aspects of contract management and project operation, and dispute settlement mechanisms.

20. Secondly, there appears to be increased consensus on issues for which there was previously no accepted policy solution. Examples include governance and social responsibility, the avoidance of fraud and corruption, addressing conflicts of interest, and the interaction between PPPs and other laws.

21. Thirdly, the split between the various PFIPs Instruments, and the fact that some issues are covered in more than one location in the PFIPs Instruments, indicate that a re-presentation of the guidance and provisions would enhance their readability. Examples include references to other relevant laws and financial and investment issues.

22. Since the Commission session, the Secretariat has also engaged in consultations with experts and agencies working in PPPs reform, through exchanges of documents, teleconferences and in-person meetings, so as to complement the survey described above with the views of these experts and agencies.

23. The consultations as a whole identified a series of issues that warrant specific consideration as the key elements indicating a revision of the PFIPs text. The following section therefore considers each of the topics concerned.

# III. Main issues for further work on PPPs

## A. Scope of any future legislative text on PPPs

24. An initial issue addressed in the consultations was the scope of any future legislative text. The Legislative Guide contains options for the types of concessions to be regulated,[10] but none of the PFIPs Instruments addresses the scope of an enabling law per se.

25. This issue is more complex than may be immediately apparent, partly in that there is no universal definition of PPPs. At the 2013 Colloquium, it was noted that the historically more common type of PPP is an infrastructure project with accompanying private sector delivery of associated services to the public ("infrastructure plus service PPP"), in which the operator is paid under a concession mechanism. This is the focus of the PFIPs Instruments. As also reported, however, PPPs now include the development of non-tangible infrastructure with service provision, the private provision of public services without infrastructure development, and other contractual arrangements (partnering, alliancing, some institutional PPPs, long-term leases, leasing and management contracts).[11] The scope of services concerned now ranges from simple to complex: for example in health-sector PPPs, from clinical services to more common facilities, cleaning and catering services.

[10] See Chapter I, Section C.2, especially para. 19.

[11] See the Discussion Paper for the 2013 Colloquium, supra, paras. 11-12, 17-18, the reports and documents referred to therein, and the 2013 Colloquium report.

26. A further variant of PPPs arises where a private party provides what are generally considered to be public services but that have not previously been available. Here, the authorities may subsequently seek to regulate and cooperate in the provision of the services. Reported examples of such cases include water and waste management services in Francophone Africa, and health services as described above.

27. It has also been reported to the Secretariat that private finance in infrastructure development (without associated service provision) is increasing in countries such as France, Morocco, Qatar, Tunisia, Turkey and the United Arab Emirates.

28. The surveys unsurprisingly indicate that the legislative map is highly varied, both in form and scope. Some States have public procurement and concessions laws, but no law addressing other forms of PPP; others are reported to address several forms of PPP, the lease and sale of government assets and divestments in procurement laws, though privatizations are as a rule addressed through project-specific enabling legislation.

29. In addition, the scope of existing international texts on or that may have relevance for PPPs varies: the OECD Basic Elements[12] include natural resource concessions (excluded from the PFIPs Instruments). The consultants report that the laws of Kenya, Kosovo and Kyrgyzstan all exclude natural resource projects.

30. At the 2013 Colloquium, it was considered that UNCITRAL should consider new types of PPPs that are not within the current scope of the PFIPs Instruments. However, the majority of the experts consulted report that the overwhelming majority of PPPs for the most likely users of a legislative text — developing countries and those in transition — would be infrastructure plus service PPPs, and that perhaps 20 per cent of the issues arising in these projects pose 80 per cent of the problems identified as obstructing effective PPPs.

31. The key features of infrastructure plus service PPPs are the construction and operation of the infrastructure and the delivery of the associated public services by the private sector. These elements involve an emphasis on private service provision as well as private finance; this in turn implies a shift of emphasis in the PFIPs Instruments, which do not address service provision in detail.[13]

32. The notion of infrastructure plus service PPPs, however, leaves considerable areas of uncertainty. First, infrastructure projects without associated services could be covered in practice by referring only to the infrastructure-relevant sections. However, there are significant differences from the projects addressed in the PFIPs Instruments, which focus on project finance as the main financial mechanism. The private investment is reimbursed through the revenue stream arising under a concession framework for the operation of the infrastructure facility.[14] Without service provision, the reimbursement of the private investment must come from the

[12] Available at http://ppp.worldbank.org/public-private-partnership/library/oecd-basic-elements-law-concession-agreements.

[13] See Chapter IV of the Legislative Guide, page 129, Recommendation 53, and Model Legislative Provision 28(h), for example.

[14] See, for example, Section II of the Legislative Guide, "Project risks and government support", pp. 37-59.

contracting authority, and not from users. This type of PPP is often termed "public payment PPP" or "PFI/PPP".[15] In addition, there may be mixed contracts.

33. If the Colloquium considers that some or all public payment PPPs should be included in a future legislative text, it may wish to indicate additional issues that may be involved. Examples include which law will govern these transactions — would they fall within the public procurement law?[16] Some contractual and other implications are addressed in the section below on Funding and investment issues, and in the section on Legislation vs. contract in Part II of this paper.

34. Infrastructure PPPs without service provision generally include natural resource and agriculture concessions are infrastructure projects (broadly defined). The 2013 Colloquium report indicated a preference for excluding such projects because they involve a wide range of issues, many of which would not be relevant beyond particular projects or these sectors, and as there is existing international guidance on, for example, oil and gas and mining.[17] The Colloquium may wish to address this question in its report.

35. Addressing infrastructure plus service PPPs could similarly accommodate public service projects without infrastructure development, to the extent that the infrastructure-relevant provisions are not applied in relevant projects. This approach therefore accommodates the recommendation from the 2013 Colloquium that the construction of physical infrastructure should not be considered as indispensable to a future text, and recent developments in the market. The reported increase in the scope of services in services projects — such as that described for the health sector above — may indicate, however that more complex contractual provisions are required, such as greater flexibility within the contract terms to deal with both changes and other issues emerging arising from various technological factors. The Colloquium may wish to report on additional issues that such PPPs would involve if it wishes to include them in the recommended scope of any future text.

36. A further type of PPP is an "institutional PPP", in which the project vehicle is a joint venture held between the contracting authority and a service provider. Examples provided to the Secretariat include institutional PPPs in the power and health sectors. Other new PPP structures include those in which the private party is in fact a State-owned enterprise. The Colloquium may wish to consider whether there are any additional provisions that would be required if such PPPs are to be included in a future legislative text on PPPs.

37. In summary, the consultations indicated that:

(a) The concept of PPPs should be kept flexible, leading to an umbrella concept that could be subdivided, rather than a strict definition of PPPs. The main relevant concepts identified would then operate as a description of PPPs;

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[15] The "PFI" generally refers to the UK Private Finance Initiative.

[16] See, further, paras. 41 and 79.

[17] See, for example, (a) the publications of the Extractive Industries Transparency Initiative (EITI) at http://eiti.org/. EITI is an international standard that ensures transparency around countries' natural resources, and is developed and overseen by a coalition of governments, companies, civil society, investors and international organizations; and (b) the Sector-specific toolkits of the World Bank available at http://ppp.worldbank.org/public-private-partnership/sector.

(b) A key element for additional regulation is the private provision of public services; and

(c) The need is for general principles that can be applied to regulate the common elements of all PPPs.

38. The consultations did not, however, reach a common position on the precise scope of the PPPs to be addressed. Here, the extent of work and likely appetite of UNCITRAL's member States for a PPPs project may be relevant. The 2013 Colloquium observed that UNCITRAL should engage in work that was feasible within a time-frame that would allow the project to meet what was considered to be "an urgent need for a more general UNCITRAL standard on PPPs".

39. In the light of this observation, the need to recommend a reasonably certain scope of work to the Commission, the tensions between trying to address all forms of PPPs and producing a text in a relatively short time-frame, the majority of the experts consulted recommended that UNCITRAL should focus its efforts on legislative development for infrastructure plus service PPPs. As a practical example of the type of choice that these resource-related issues implies, see, further, paragraphs 55-56 in the section on Cross-border PPPs, below.

40. The Colloquium may wish to set out in its report to the Commission the types of PPPs that are to be included in any future legislative text, those that are to be excluded, and those where a decision is not yet taken. It may also note that regulators of excluded forms of PPPs could draw on the core PPPs topics and guidance on them in a future UNCITRAL text (and UNCITRAL could in due course decide to address other forms of PPPs, as separate future topics).

41. A second and related issue of scope is the demarcation of public procurement, concessions and PPPs laws. The Commission has previously heard that infrastructure projects form a spectrum from public procurement, via PPPs, to privatization.[18] The expert consultations emphasized that clarity of scope is critical to allow for States to ensure that the law(s) applicable to each project is or are clear. Options could be to regulate all the procurement-related parts of such transactions under the public procurement law, and to enact separate laws regulating different types of projects from start to finish, with identical provisions as appropriate (e.g. as regards the planning, procurement and key service provision elements), to ensure consistency. An initial indication on this issue may assist the Commission in assessing the length and scope of any mandate to be given.

42. The Colloquium may also wish to elucidate in its report to the Commission that the initial activities in legislative development would be to map the main issues that are likely to be solvable through legislation for the PPPs concerned (including whichever of the variants above the Colloquium concludes should be addressed), based on the studies referred to above and relevant international instruments, for consideration by a Working Group. The policy solutions to these issues would draw from the research carried on to date and ongoing studies.

[18] Para. 32, 2013 Colloquium discussion paper. See, also, para. 79 of this paper on potentially overlapping laws.

## B. Key topics for inclusion in a PPPs legislative text

43. As reported at the 2013 Colloquium, four main areas relevant for regulation of PPPs are the legal and regulatory environment; project planning, including the allocation of project risks and government and donor support; selection of the project partner (supplier or concessionaire); and the project agreement and project operation and management. These four areas are not precise demarcations between aspects of PPPs, but are grouped together for ease of reference and discussion in the current forum. (Should UNCITRAL take up the topic of PPPs, it may then consider it appropriate to address how best to put these areas together in a single legislative text.)

44. The following sections of this paper report on the main issues arising from the Colloquium that the expert consultations confirm should be revised or re-presented as compared with their treatment in the PFIPs Instruments as currently formulated, or that should be introduced into a PPPs legislative text as new topics. They are grouped into the four thematic areas referred to in the preceding paragraph. The consultations emphasize that these are the main issues, and are not intended to provide an exhaustive list of topics for revision.

45. Given the conclusions of the 2013 Colloquium and subsequent expert advice that the point of departure should be the PFIPs Instruments, the current treatment in the PFIPs Instruments is summarized where relevant, and recommendations are made regarding the extent to which the PFIPs Instruments should be revised and re-presented.

46. This section also highlights some further topics in the PFIPs Instruments in respect of which more minor revisions may be warranted.

### 1. The legal and regulatory environment

*(i) Institutional framework*

*Relevant Legislative Recommendations: 1, 6-8*

*MLPs: No reference*

*Legislative Guide "Administrative coordination", Section D in Chapter I ("General legislative and institutional framework")*

47. A robust institutional framework and related processes are well-recognized as vital to effective PPPs and to attracting investors in PPPs. The experts advise that not only are the issues concerned new to most countries, they are also substantially different in many aspects from traditional public procurement projects. They include designing the scope and evaluating the affordability of services, the use of land (perhaps involving expropriation, resettlement, etc.) and more complex contracts to reflect both the long-term nature of the project and financial and operational issues. Coordination between several ministries will be required; financial, tax and accounting aspects of most projects need to be assessed (such as contingent liabilities and other issues discussed in "Funding and investment", below); issues of public payment, subsidies, or State guarantees will necessitate at least coordination, and in most cases an endorsement from the Ministry in charge of the finance and/or budget.

48. An appropriate and comprehensive institutional framework to plan, design, develop and manage projects, drawing on international best practices is therefore required. There are many source materials recently published on this topic, but they remain incomplete;[19] for example, many focus on PPP planning and preparation, transparency, and to some extent procurement.[20]

49. PPPs Units, which are recommended in the Legislative Guide, have proven successful in some developed countries (e.g. in the United Kingdom, Australia and France, notably for PPP/PFI contracts and for projects at the national level). The results have been less positive in developing countries. As OECD notes, "The PPP Unit should enable authorities (e.g. line ministries) to create, manage and evaluate a PPP efficiently and effectively. This role requires that the PPP Unit have the requisite in-depth financial, legal, economic and project management skills."[21]

50. In addition, and particularly in emerging economies, an efficient PPP institutional framework goes much beyond the organization and the support of a central PPP Unit. Again, according to OECD, key institutional roles and responsibilities should be clarified to address fiscal and budgeting issues, procurement aspects, auditing of PPPs, and monitoring rules and enforcement.[22] A holistic approach to institutions is therefore required.

51. The institutions will need to reflect core principles of independence and transparency in organization and governance; the experts advise that these have not been sufficiently addressed in existing legislation, and so should be reflected in any future legislative text on PPPs.

52. The experts therefore suggest revisions to the Legislative Guide to take account of developments in PPPs institutions, and that the scope of the Legislative Recommendations and Model Legislative Provisions should be expanded. Further details of these issues, and commentary on the implications of the consultants' finding that the recommendations on the authority to regulate infrastructure services are not generally followed in country laws, will be provided at the Colloquium.

*(ii) Cross-border PPPs*

*No references in the PFIPs Instruments*

53. Cross-border projects (CBPPPs) have been in existence for as long as infrastructure or service projects. However, when the PFIP Instruments were prepared, little attention was given to the questions that CBPPPs raise, so the topic is not addressed in those Instruments. The consultants also report that there is no CBPPPs enabling provision in the countries surveyed. In times of globalization, increased regional cooperation, and technical development, cooperative

[19] See the PPIAF "Reference Guide on PPPs, 2012, available at http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/WBIPPIAFPPPReferenceGuidev11.0.pdf.

[20] See for instance: PPIAF Note No. 4 "Developing a PPP framework: policies on PPP unit" (May 2012), available at www.ppiaf.org/site./ppiaf.org/files/documents/Note-Four-Developing-a-PPP-Framework.pdf.

[21] OECD "Principles for the public governance of Public-Private Partnerships", available at www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm, section 2.

[22] Ibid.

arrangements across national borders will substantially increase in numbers. Various studies point at the significant specific positive effects of CBPPPs: in short, CBPPPs increase the level of trade, trade openness, and support broader economic growth. Examples of CBPPPs can already be found across all continents and across all areas ranging from infrastructure to tourism and space projects. Another main reason for initiating CBPPPs is the fact that some challenges cannot be tackled alone by a single country (for example financing would otherwise not be possible).

54. Although the very positive effects of CBPPPs are widely acknowledged, a wide-spread reluctance to launch CBPPPs can be noted. The most significant obstacle to CBPPPs reported is the lack of guidance to address appropriately the specific legal problems inherent to CBPPPs, which is seen as a major obstacle to unleash their acknowledged great positive potential. The experts suggest that UNCITRAL, as an international platform, would be best suited for remedying this lack of guidance. UNICITRAL could also address the legal aspects related to CBPPPs in an appropriate manner, and the experts report that experience with the PFIPs Instruments also shows that CBPPPs should be addressed in any future PPPs text.

55. The experts suggest three options how such provisions on CBPPPs might be included:

(a) First the issue could be dealt with by creating a new legal regime ("regime X") on the international level establishing new and additional regulations/provisions. These provisions should provide sufficient detail while at the same time guaranteeing the necessary flexibility and adaptability, be aligned with other existing international instruments (including UNCITRAL's other instruments) and be coordinated with international organizations such as UNCTAD, WTO and OECD. This option would entail extensive preparatory and drafting efforts;

(b) The second option would be the development of special provisions on certain necessary basic aspects of CBPPPs combined with the introduction of guidance on how to use, adopt and adapt existing provisions already in force to the international context and aspects. UNCITRAL would therefore in essence limit itself to giving guidance on the considerations to be made when adopting the relevant provisions for CBPPPs. However, as already pointed out, also this option would need drafting efforts (regarding the necessary legal preconditions when implementing this option, especially on how to create a kind of collision and remedy regime);

(c) The third option would be a combination of option 1 ("regime X") with option 2. As a consequence of this option a decision would have to be made as to which areas would be fully (new) regulated on the international level and in which areas a reference to existing legal regimes would be implemented.

56. Noting the vast range of considerations and legal areas involved with CBPPPs, UNCITRAL's scarce resources, and criteria for future work and modus operandi, the experts advise that the implementation of the first and third policy option are too burdensome and resource intensive. The decision-process on which areas should be (newly) regulated and which not in policy option three might prove very lengthy and arduous. Therefore, the experts recommend policy option two.

*(iii) Governance and social responsibility*

*No references in the PFIPs Instruments*

57. The Rio +20 declaration called on "the private sector to engage in responsible business practices, such as those promoted by the United Nations Global Compact".[23] Corporate governance principles coalesce around the idea of ensuring stronger transparency and accountability in the corporate sphere. There is a clear public interest in ensuring appropriate corporate standards of behaviour (some competitive tactics, normal in the private sector, will not be appropriate in PPPs), but how far this notion extends is not certain.

58. As PPPs are a collaboration between the public and private sectors, a proper balance between corporate governance and equivalent public standards on accountability and transparency obligations is required. For example, how should the need for due diligence be addressed, given that the project company is responsible not just to shareholders, but to a wider group of stakeholders, and has ongoing obligations of public service delivery? Due diligence in public procurement operates under well-understood rules, but the PPPs situation is more complex and less well-addressed. Also, which private sector entities are to be covered?

59. The long duration of the relationships between the partners (often multiple and changing) and the particularities related to risk distribution also require clear and adequate governance frameworks at all stages of a PPP project (decision-making, procurement, operation, termination). There may need to be rules on changes in the corporate structure to avoid the risk of all obligations being left in empty shell companies, to ensure a legal entity that will be responsible for all the obligations for the entire length of the project, and rules on equity sales may be required (construction companies, for example, will not generally wish to remain long-term shareholders). As the private partner usually has a complex organizational structure with various subsidiaries, associated or joint venture companies, the experts advise that it is equally important to make sure that any requirements applicable to the main contractor are also applied to these entities, and broader rules on subcontracting are needed.

60. Although PFIPs Instruments touch upon some of the issues linked to establishing clear rights of shareholders and stakeholders (creditors, employees, customers) or the organization, functions and responsibilities of boards of directors (collectively and individually), these matters need to be further explained and complemented. There is a need to protect the public authority's interest in ongoing service delivery (for which a range of widely-different tools may be available, raising complex policy issues). Future work should address potential controversies in preventing and addressing corruption, conflicts of interest, the independence of board members, directors, executives and auditors and establishment of code of conducts promoting high standard ethical behaviour. Accountability and responsible decision-making indicate improved oversight mechanisms (such as committees, units, audit and other authorities), internal control systems over boards and audits of financial statements.

[23] Para. 46, the future we want.

61. The questions of standards on accurate and periodic disclosure of information and sufficient transparency in financial reporting and accounting relevant to governance are addressed in the section on Transparency in Part II of this paper.

62. Finally, the international community has also been increasingly involved in promoting new core values applicable to any business environment and encompassing human rights, environmental protection, long-term sustainability, anti-corruption measures, board's risk management and oversight, relationship with management and accountability to shareholders. OECD has also developed 12 principles, focused around 3 objectives, which may provide a starting-point for provisions:

(a) Establish a clear, predictable and legitimate institutional framework supported by competent and well-resourced authorities;

(b) Ground the selection of PPPs in value for money; and

(c) Use the budgetary process transparently to minimize fiscal risks and ensure the integrity of the procurement process.

63. The experts recommend that the necessary requirements could be imposed through the legislative framework and/or through contractual or other mechanisms, and some consider that these should not exceed requirements on other corporations in relevant sectors to protect ongoing participation in the market. The Colloquium may wish to consider how to scope a relevant recommendation to the Commission.

*(iv) Funding and investment issues*

*Relevant Legislative Recommendation 13, "Government support"*

*MLPs: None*

*Legislative Guide: Section B.4 "Financing structures and sources of finance for infrastructure", in "Introduction and background information on PFIPs"; Section A, "General remarks", and Section C, "Government support", in Chapter II, "Project risks and government support"*

64. The PFIPs Instruments focus on the notion of project finance (that is, non-recourse lending in the sense that the investment in the project is recouped from its assets and revenue, not the lenders). However, as the Legislative Guide notes, additional security and credit are often required, including government support, so the funding is in reality limited recourse. Common sources of debt and equity financing are described in the Guide. The experts have reported an increase in initial financing from construction companies and other forms of private finance, such as pension funds. Some of the investments are designed to be short term; others, long term.

65. Assessing the fiscal sustainability of the project requires an analysis, inter alia, of the following issues:

(a) Is the potential PPP project of a scale to justify the transaction costs?

(b) Will the investment be repaid by the contracting authority, end users, or a mixture?

(c) If end-user charges are levied, will demand be sufficient over the lifetime of the project?

66. The answer to the first of these questions, in addition to its relevance to whether a project should be conducted as a procurement or PPP, has raised many issues in practice. Existing PPP models have received considerable criticism for excessive transaction costs, which distort this question. They include high consortia fees and high tender costs exacerbated by lengthy selection processes, and windfall profits. Equity financing is also reported sometimes to be more expensive than debt financing, but it may have other benefits, such as if there is broad equity participation over the longer term.

67. Various Governments are promoting solutions designed to address these issues through enhancing long-term equity investment, details of which will be presented to the Colloquium. They are considered to involve tailored governance solutions (such as a legislative framework defining organizational structures, transparency, assurance, and reporting processes, rather than relying on contractual provisions); the possibility of government guarantees for rates of return to pension fund investors; and periodic fund management re-competition during the investment period.

68. In Australia, one proposed solution is a two-phase "inverted" procurement process for PPP: there is a first competitive process for equity funding to determine market appetite and set threshold rates of return, prior to the business case and procurement phase. A similar process could be set for debt financing.

69. However, it has been reported that pension funds and similar funds may not be able to invest in projects unless the project's social/economic goals are declared and can be monitored.[24] In addition, without reforms to procurement processes, enhanced transparency throughout the project, and improved contract management and governance in the operation phase (discussed elsewhere in this section), they may not be willing to invest.

70. The Colloquium may wish to consider the extent to which any future legislative text on PPPs should address these issues, including as a separate topic or as part of other relevant topics.

*(v) PPPs with small-scale operators*

*No references in the PFIPs Instruments*

71. The projects for water and waste management services in Francophone Africa referred to in paragraph 26 above were concluded with small private operators. Such projects were historically considered to be outside the PPPs environment. However, as public authorities have started to organize and regulate these services in cooperation with such operators, the position has changed. As many such PPPs operate in urban situations, the services concerned can be paid through concessions — the example of Morocco was cited to the Secretariat.

[24] As regards goals and objectives, see the section on Sustainable Development issues; disclosure and confidentiality issues are addressed in the section on Transparency, both found in Part II of this paper.

72. There are benefits of such PPPs to development goals — local employment and the creation of a local private market, providing public access to essential services (waste and water collection, transport, sanitation and electricity, for example). In public procurement, policies designed to support SMEs are common (ranging from process simplification to financial support). Projects with small private operators can also operate as capacity-building tools.

73. The Colloquium may wish to consider which, if any, of such projects should fall within the PPPs that UNCITRAL may address, from a policy perspective. For example, publicly-funded projects can evidently be simpler SME-support tools than those under concessions, because the funding is relatively secure, and arises under long-term contracts.

74. If these projects are to be addressed, a secondary issue is whether the regulations (e.g. selection procedures) should be relaxed to encourage small private operators. The experts' views differed on this question.

75. Other relevant issues include how to define relevant operators, ensure equity investment in those operators, design appropriate payment systems, develop capacity through regulation and/or guidance, provide appropriate institutional support, and how to allow for changes during the project period that may have a very significant impact on smaller operators.

76. The Colloquium may care to note that the Conseil d'État of France, the Agence Française de Développement and the World Bank are leading a community of practice in PPPs with small private operators. Further information on such PPPs will be provided to the Colloquium.

*(vi) Consistency between PPPs and other laws*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: Section B.1(a), "Competition Policy and Monopolies", in "Introduction and background on PFIPs", and Chapter VII, "Other relevant areas of law"*

77. The importance of ensuring that the legislative framework adequately addresses other relevant laws was noted at the 2013 Colloquium. The current Legislative Guide addresses competition law and policy, and a range of other relevant laws from national laws on the promotion and protection of investment to anti-corruption measures, and relevant international agreements. The experts have advised that existing guidance requires updating, and some revision, building on the current Legislative Guide, on such matters as promotion and protection of investment (including developments in case law, business risk and perceptions); competition law; licensing law; data protection and information disclosure law (see, also, the section on Transparency in the second part of this paper). Additionally, developments in constitutional issues -- such as the extent to which a project agreement should be uplifted to the status of legislation and so would override prior inconsistent laws — and in case law[25] are cited as requiring review.

[25] The Experts referred to cases at ICSID (https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) and the many cases relating to the Eurotunnel project.

78. The Colloquium report stressed that not all such issues are capable of legal resolution, and that a future legislative text should focus on legislative solutions.

79. The Colloquium may wish to consider how to provide appropriate guidance to support any future legislative text. For example, the Guide to Enactment accompanying the Model Law on Public Procurement sets out other relevant laws to assist in the implementation and use of the Model Law;[26] UNCITRAL has also published a paper on procurement regulations, which explains how the Model Law may be supplemented by such regulations.[27] In the PPPs context, an equivalent approach could draw attention to potentially overlapping laws to avoid conflicts (existing procurement and/or concessions laws; privatization laws, the laws referred to in the existing Legislative Guide, and sector-specific regulation).[28]

80. The Commission may also wish to consider two related topics, arising out of the United Nations Convention Against Corruption (UNCAC),[29] which the experts advise are out-of-date in the PFIPs Instruments.

*(a) Anti-corruption and integrity measures*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: "Promotion of the integrity of and confidence in the selection process", "Transparency of laws and procedures", Items 2(b) and (c) in Chapter III. (in "General objectives of the selection process"; "Anti-corruption measures", Item B.14 in Chapter VII (in "Other relevant areas of law")*

81. UNCAC came into force after the issue of the PFIPs Instruments and so was not taken into account when the latter were drafted. It contains provisions relevant to PPPs in article 9 ("Public procurement and management of public finances") and article 12 ("Private Sector").

82. The Legislative Guide notes the importance of integrity measures and appropriate rules for government contracts, outlines some key elements, and refers the reader to international texts pre-dating UNCAC as sources for relevant provisions. At the 2013 Colloquium, it was noted that more emphasis was needed on transparency and accountability measures throughout the project, public disclosure of resource transfer from the public to the private sector and vice versa, and on media for communications and meetings.

83. The 2013 Colloquium noted that the Model Law on Public Procurement was drafted specifically to comply with UNCAC, and underscored the importance of consistency between the Model Law and any future PPP text as regards integrity measures.

84. The UNCAC requirements for the management of public finances include procedures for the adoption of the national budget; timely reporting on revenue and expenditure; accounting, auditing and oversight; risk management and internal

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[26] Para. 61, in Section C, "Implementation and use of the Model Law ...".

[27] Document A/CN.9/770, available at http://uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

[28] See, also, para. 41 on potentially overlapping laws.

[29] United Nations, *Treaty Series*, vol. 2349. Also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

control systems; and measures to preserve the integrity of relevant documentation. These requirements, set out in the Technical Guide to UNCAC regarding article 9,[30] are supplemented by requirements in article 10 for public reporting and transparency (access to information concerning public administration and periodic public reporting) and in article 12 for measures to prevent corruption involving the private sector, referring specifically to PPPs and corporate governance.

85. OECD has issued a series of relevant publications that can assist in crafting relevant standards. The Principles for the Public Governance of PPPs referred to above set out the need for a clear, predictable, legitimate and appropriately resourced institutional framework — involving public awareness through consultations of the relative costs, benefits and risks of PPPs and public procurement; the need to maintain key institutional roles and responsibilities (to ensure prudent procurement process and clear lines of accountability); and the need for regulation to be clear, transparent, enforced and not excessive. They also discuss the need for a transparent budgetary process to minimize fiscal risks and ensure integrity of the procurement process in PPPs, with disclosure of all costs and contingent liabilities and the need to ensure the integrity of the procurement process, and refer to other OECD reference tools.[31]

86. The Colloquium may therefore be of the view that the PFIPs Instruments require revision to comply with prevailing international standards, drawing on the above texts.

*(b) Conflicts of interest*

*Relevant Legislative Recommendations/MLPs: None*

*Legislative Guide: "Institutional Mechanisms", Item E.2 in Chapter I (in "Authority to regulate infrastructure Services") (paras. 37, 38 and 47); "Choice of subcontractors", Item 1(a) in Chapter IV (in "General contractual arrangements") (para. 101); "Company law", Item B.8 in Chapter VII (in "Other relevant areas of law") (para. 32)*

87. Related to the preceding topic is that of conflicts of interest. PPPs are often complex: many stakeholders, complex financing schemes, different traditions and usages, long-term duration, the public nature of the services provided by the project, and disputes of varying and complex nature.

88. Such projects involve a multitude of parties and public entities: the Government or a public authority, a concessionaire or contracting private party, a legal entity established by the private side with separate legal personality (a special purpose vehicle — "SPV"), sponsors, lenders — institutional and others — capital markets, advisers, insurers, an operator, contractors, suppliers, users, and supervising authorities.

89. The structure of PPPs has an inherent potential for conflicts of interest. PPPs typically involve the same parties in various capacities. The sponsors are typically owners of the project and often also contractors or suppliers to the project. The

[30] Available at www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf.

[31] See, further, a discussion handout for the preparation of the Principles — available at www.oecd.org/gov/budgeting/48144872.pdf.

primary interest of the sponsors as contractors or suppliers are in most cases to build the infrastructure of the project or to provide goods or services to the project. In their capacity as sponsors, they will control the SPV and its contractors and suppliers, which could entail a preference for the position of the contractors or suppliers. Typically, directors and managers of the SPV are employees of the sponsors and subordinate to officers of the sponsors. When the Government becomes part of the group of owners, its interest is the public interests and not primarily the interests of the SPV, and the representatives of the Government involved in the management of the SPV have the role of safeguarding the interest of the Government. Also, the Government may have many other roles: tax collector, regulator, project supervisor, financier, service provider, owner of assets needed for the project and of competing providers of goods and services, etc. Also financiers will have a controlling role which in project finance structures is very strong, in particular over project cash flows.

90. Many situations will arise where the interest of the various participants collide. Such cases of conflicts may arise regarding the use of cash flow and profits, when there are disputes between or among project participants, regarding quality of the construction, goods or services, etc.

91. It seems as if the problems connected to conflicts of interest have attracted little attention, maybe because they are not understood or that some participants are inclined to benefit from this. These problems have only sporadically been addressed in the Legislative Guide on Privately Financed Infrastructure Projects and not at all in the Legislative Provisions. In addition to a brief reference to the issues relating to the sponsors of the SPV set out above, the Legislative Guide simply recommends provisions on conflicts of interest for staff of regulatory agencies and for staff of the contracting authority during the selection process, and that contractors disclose potential subcontractors to identify possible conflicts.

92. It is therefore proposed that conflicts of interest should be included in work to develop a future legislative text on PPPs, drawing on (among other things) the requirements for Codes of Conduct under Article 8 of UNCAC, the requirements under Article 9(1)(e) of that Convention for measures to regulate personnel responsible for procurement, and the reflection of those provisions in article 26 of the UNCITRAL Model Law on Public Procurement and accompanying Guide to Enactment, and possibly on provisions dealing with conflicts of interest in the concession award procedures in a proposed directive on concessions in the European Union. These measures may include declarations of interest, screening procedures and training requirements, and contractual arrangements.

[*This paper continues in document A/CN.9/820*]